Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

MICHAEL A. NEWDOW;

Petitioner,

v.

PETER LEFEVRE, LAW REVISION COUNSEL, ET AL.;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether "In God We Trust," as inscribed on the nation's coins and currency bills, violates the Establishment Clause of the First Amendment.

(2) Whether "In God We Trust," as inscribed on the nation's coins and currency bills, violates Petitioner's rights under the Religious Freedom Restoration Act (42 U.S.C. § 2000bb-2000bb-4 (2006)).

LIST OF ALL PARTIES

Plaintiff/Petitioner

(1) Michael Newdow

Defendants/Respondents

(1) Peter Lefevre, Law Revision Counsel
(2) The United States of America
(3) Timothy F. Geithner, Secretary of the Treasury[1]
(4) Edmund C. Moy, Director, United States Mint[2]
(5) Larry R. Felix, Director, Bureau of Engraving and Printing[3]
(6) The Congress of the United States of America,
(7) Pacific Justice Institute[4]

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[1] Timothy F. Geithner, Secretary of the Treasury, is substituted for his predecessor, Henry M. Paulson, Jr., who himself was substituted for his predecessor, John W. Snow, pursuant to Fed. R. App. P. 43(c)(2).

[2] Edmund C. Moy, Director of the United States Mint, is substituted for his predecessor, Henrietta Holsman Fore.

[3] Larry R. Felix, Director of the Bureau of Engraving and Printing, is substituted for his predecessor, Thomas A. Ferguson.

[4] The Pacific Justice Institute appeared in this case as a Defendant-Intervenor.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is available at *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010). It is reprinted in the attached Appendix A (App. 1-18).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its decision on March 11, 2010, and entered an order denying petitioner's motion for rehearing on October 8, 2010. By writ of certiorari, this Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Court of Appeals' decision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The issues in this case are based on the First Amendment's Religion Clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"), and on the Religious Freedom Restoration Act (42 U.S.C. § 2000bb-2000bb-4 (2006)). *See* Appendix B (App. 19-22). It is contended that these constitutional and statutory provisions are violated by 31 U.S.C. § 5112(d)(1) (2006) ("United States coins shall have the inscription 'In God We Trust'. ...") and 31 U.S.C. § 5114(b) (2006) ("United States currency has the inscription 'In God We Trust' in a place the Secretary decides is appropriate. ..."). Additionally, along with 36 U.S.C. § 302 (2006) ("'In God we trust' is the national motto"), these statutes stigmatize those with Atheistic beliefs.

STATEMENT OF THE CASE

This case involves a challenge to the federal government's use of the phrase "In God We Trust" on the nation's coins and currency bills. Petitioner – a minister in an Atheistic church and also a numismatist – contends that this use endorses Monotheism, which is a religious belief system completely incompatible with, and contrary to, his own religious ideology.

The use of "In God We Trust" on the money interferes with Petitioner's ministry. Not only is that claim sacrilegious in its assertion that God exists, but it forces Petitioner (as well as his fellow parishioners and clergy) to choose between availing himself of the right to use the sole legal tender manufactured by the government and violating his religious duties.[5] Newdow and his religious brethren emphatically do not trust in God, which they, as Americans, believe they are implying when they use the nation's coins and currency. Accordingly, spending and/or accepting United States money is always problematic. This matter is especially acute when it relates to church functions. When "the plate" is passed during church services, nothing is obtained unless parishioners go out of their way to bring personal checks or find money (without "In God We Trust") from decades past. Purchasing materials for church functions – particularly when credit cards or checks are not taken – becomes exceedingly difficult.

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[5] In addition to denying the existence of any god, members of Newdow's church follow three basic tenets: (1) Question, (2) Be Honest, and (3) Do What's Right. Declaration of Michael Newdow, May 9, 2006, ¶ 7 (Excerpts of Record (EOR) at 232).

Furthermore, when seeking to proselytize during travel to foreign nations, transaction costs for obtaining local coins and currency become excessive. Defendants' Monotheistic inscriptions, therefore, violate not only the Establishment Clause, but the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA")[6] as well.

By forcing him to confront the espousal of God's existence every time he looks at a monetary instrument minted by his national government, Defendants also severely curtail Petitioner's numismatic desires. Furthermore, those numismatic activities in which he does engage are rendered far less enjoyable than would be the case were the government to refrain from Monotheistic religious advocacy when minting and engraving its coins and currency.

With his claims arising under the Constitution of the United States, Petitioner filed this lawsuit pursuant to 28 U.S.C. § 1331. Jurisdiction also existed under 28 U.S.C. § 1346(a)(2) and under 42 U.S.C. § 2000bb-1(c). Declaratory relief was sought pursuant to 28 U.S.C. § 2201(a) and § 2202, and injunctive relief was sought pursuant to 28 U.S.C. §§ 1343(a)(3) and (a)(4).

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[6] 42 U.S.C. § 2000bb–1(a) states, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." Subsection (b) states, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *See* Appendix B at App. 20.

RULING OF THE COURT OF APPEALS

The Court of Appeals ruled that Petitioner's claims were foreclosed by binding Ninth Circuit precedent. Specifically, in *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970), *see* Appendix F (App. 47-52), the Ninth Circuit had held that "the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion."

NOTE REGARDING *ARONOW*

The Ninth Circuit rendered its *Aronow* decision even though the District Court had explicitly found that the plaintiff there lacked standing. 432 F.2d at 243. *See also Aronow* District Court's Order dated September 30, 1968. Appendix E at App. 45 (¶ 5). Furthermore, the lower court had described the Complaint as "unintelligible." *Id.* (¶ 3). Thus, the *Aronow* judges were not assured of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Furthermore, by ruling on the merits without first determining that it had jurisdiction, the *Aronow* panel engaged in a process that has since been deemed impermissible. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

Upon this insubstantial foundation, not only the Ninth Circuit (in the case at bar), but three other Circuits have upheld the constitutionality of governmental espousals of "In God We Trust." *Kidd*

v. Obama, No. 10-5006, 2010 U.S. App. LEXIS 15154 (D.C. Cir. July 21, 2010) (unpublished opinion); *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (per curiam) (relying on *O'Hair v. Blumenthal*, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978)). *See also North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991) (enjoining state judge's courtroom prayers, while citing *Aronow* for the proposition that "In God We Trust" has "'no theological or ritualistic impact'"). Accordingly, if (as Petitioner argues) the inscription of "In God We Trust" on the nation's money (i) violates the Establishment Clause, (ii) violates RFRA, and (iii) relegates the nation's Atheists to second-class status, it does so largely due to precedent from a case that took root with an "unintelligible" complaint and that lacked "perhaps the most important" jurisdictional requirement. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

REASONS FOR GRANTING THE PETITION

I. A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Religion (in general) and God (in particular) are huge issues in our society, and whether or how government should involve itself in those issues are matters of great national importance. Accordingly,

clearly defined parameters are needed to guide both those who serve in the legislative and executive branches, and those who are asked to adjudicate the myriad religion cases filling the dockets of the state and federal courts. Yet, in the fifteen years since this Court's Establishment Clause jurisprudence was characterized as being "in hopeless disarray," *Rosenberger v. University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J. concurring), it seems that little has changed. Accordingly, judges "struggl[e] mightily to articulate when government action has crossed the constitutional line," *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1156 (10th Cir. 2010), attributing this difficulty to "the Supreme Court's failure to 'prescribe a general analytic framework within which to evaluate Establishment Clause claims.'" *Id.* (citation omitted). Similarly, "the Court's Establishment Clause jurisprudence is often derided as inconsistent," *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1074 (9th Cir. 2010) (Reinhardt, J., dissenting), with "less-than-clear Supreme Court precedent," *Skoros v. City of New York*, 437 F.3d 1, 43 (2nd Cir. 2006) (Straub, J., concurring and dissenting), leading to "no clear consensus among our sister circuits." *Pelphrey v. Cobb County*, 547 F.3d 1263, 1274 (11th Cir. 2008).

This case is an ideal vehicle for ending this perpetual confusion. Focusing as it does on an activity that has often been used by justices to justify[7] (or to be distinguished from[8]) other

[7] *See, e.g.*, *McCreary County v. ACLU*, 544 U.S. 844, 889 (2005) (Scalia, J., dissenting) (justifying a Ten Commandments display); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring) (justifying "under God" in

constitutionally-suspect governmental practices, the gravamen here provides a unique opportunity to clarify the basic criteria by which Establishment Clause analyses should proceed.

There are a number of reasons as to why this is so. First, the governmental activity in this case is purely federal, with only federal defendants having been named. Thus, the original understanding of the Establishment Clause can be considered, uncluttered by Fourteenth Amendment "incorporation" issues. *Cf. Van Orden v. Perry*, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring); *id.* at 729-30 (Stevens, J., dissenting); and *McCreary County v. ACLU*, 545 U.S. 844, 898 (2005) (Scalia, J., dissenting) (all engaging in a three-way colloquy over this issue).

Second, the unique history of "In God We Trust" will allow the Court to offer key instruction as to how a challenged practice's origin ought to apply in Establishment Clause evaluations. The motto arose after a "minister of the gospel" wrote to the Secretary of the Treasury, seeking to have "the recognition of Almighty God in some form in our coins."[9] The Secretary then directed the Director of the Mint to devise a motto to declare "[t]he trust of

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the Pledge of Allegiance); *id.* at 37 (O'Connor, J., concurring) (same); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (justifying crèche display); *id.* at 693 (O'Connor, J., concurring) (same).

[8] *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting) (Ten Commandments display distinguished); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 602-03 (1989) (crèche display distinguished); *id.* at 625 (O'Connor, J., concurring) (same).

[9] H.R. Rep. No. 662, 84th Cong., 1st Sess. 2 (1955).

our people in God."[10] With that direction in mind, the Director placed in his 1863 Annual Report:

> We claim to be a Christian nation -- why should we not vindicate our character by honoring the God of Nations in the exercise of our political Sovereignty as a Nation? Our national coinage should do this. Its legends and devices should declare our trust in God -- in Him who is the "King of Kings and Lord of Lords." ... Let us reverently acknowledge his sovereignty, and let our coinage declare our trust in God.[11]

How such a clearly religious heritage ought to impact these difficult decisions is a matter about which the lower courts need guidance.

In light of the motto's history, "ceremonial deism" can also be considered. Jurisprudentially first introduced a quarter of a century ago (by Justice Brennan, who prefaced his remarks by stating that "I remain uncertain about these questions," *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting)), "ceremonial deism" has been referenced by the Supreme Court in only two other cases. In the first, neither the plurality nor the concurrence engaged in any discussion of its meaning or significance. *County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 595 n.46 (1989); *id.* at 603; *id.* at 630

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[10] *Id.* at 3.

[11] 1863 Annual Report of the Director of the Mint, at 10-11 (as provided in Anson Phelps Stokes, *Church and State in the United States*, Vol. III (1950), at 602).

(O'Connor, J., concurring). Although Justice O'Connor did offer some analysis in the second case, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-44 (2004) (O'Connor, J., concurring), no other justice joined in that concurrence. Accordingly, any high court authority for "ceremonial deism" is meager at best.

Despite this, the Establishment Clause case law of most of the circuits has become interlarded with this concept, as a host of questionable practices have (at least partially) been justified on its basis. *See, e.g.*, *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010) (justifying "under God" in the Pledge of Allegiance); *Newdow v. Roberts*, 603 F.3d 1002, 1017 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (justifying the invocation of God at presidential inaugural ceremonies); *Freethought Soc'y v. Chester County*, 334 F.3d 247, 264 (3rd Cir. 2003) (justifying a Ten Commandments plaque); *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 299-300 (6th Cir. 2001) (justifying a state motto based on a passage from the New Testament); *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996) (justifying "In God We Trust" on the nation's money); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 447 (7th Cir. 1992) (justifying "under God" in the Pledge of Allegiance); *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991) (noting how ceremonial deism justifies the Supreme Court's opening prayer, "God save the United States and this Honorable Court"). Surely it is time for this Court to advise the inferior tribunals in their use of so powerful a tool.

The inferior tribunals' overreliance upon occasional Supreme Court dicta is one more reason to grant this Petition. Although those dicta often concern the motto, they arise in the context of other Establishment Clause challenges. What has occurred is that the challenged activity is struck down, and a dissenter argues that, under the theory used by the majority (or plurality), the inscription of "In God We Trust" on the money ought to be invalidated as well. The author of the prevailing opinion will then respond so as to brush aside that argument and avoid an additional controversy.

In reviewing such cases, rather than seizing upon the dissenter's rational application of principle, lower courts have placed disproportionate weight on the retort. The clearest example of this occurred in *Allegheny County*, where a crèche scene prominently displayed in a county courthouse was held to violate the Establishment Clause. In his plurality opinion, Justice Blackmun opined that "a sound analytical framework for evaluating governmental use of religious symbols," 492 U.S. at 595, is to determine if people are turned into "outsiders" on the basis of their religious beliefs. Justice Kennedy challenged this notion, writing that "'In God we trust' ... must have [this] effect." *Id.* at 673 (Kennedy, J., dissenting). In response, Justice Blackmun stated, "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03.

In view of the "in dicta" qualifier, and the fact that Justice Blackmun's opinion was rife with

statements such as "this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine," *id.* at 590, "we have held [the Establishment Clause] to mean no official preference even for religion over nonreligion," *id.* at 604, and "the Constitution mandates that the government remain secular," *id.* at 610, it seems questionable, at best, to argue that he viewed the motto as being constitutional. Yet the lower courts have elevated his "previous opinions" sentence (and similar dicta) to the level of an authoritative pronouncement. *See, e.g.*, *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 271 (4th Cir. 2005) (asserting that the constitutionality of the motto has been "strongly indicated" by this Court); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (finding the constitutionality of the motto "confirmed by the statements of the Supreme Court"); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) (contending that this Court "proclaim[ed] that [the motto] is consistent with the establishment clause").

To interpret such equivocal statements (ancillary to the cases in which they were made and proffered without any relevant briefing) in so definitive a manner is to forget that "'[j]udges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication.'" *Pearson v. Callahan*, 129 S. Ct. 808, 820 (2009) (citation omitted). Especially where, as in the instant case, basic liberties are at stake, having the lower courts' jurists "dissect the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Ctr. v. Hicks*,

509 U.S. 502, 515 (1993) is most certainly "undesirable." *Id.* By granting this Petition, the Court will put an end to rulings patched together from occasional tangential commentary developed *ad hoc* and in the absence of advocacy. Instead, the legal landscape involving critical religious liberty issues will be focused and carefully reasoned, as is deserved.

Certiorari should be granted also because of the numerous contradictions that judges must wade through in reviewing the Court's jurisprudence. Although there are myriad such contradictions among the Establishment Clause cases themselves (as alluded to by the lower courts' comments noted at page 6, *supra*), one of particular consternation, involving a different legal realm, arose just last term. In *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), the Court examined *Miranda* warnings under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d) (2006). Because such warnings have been "embedded in routine police practice to the point where the warnings have become part of our national culture," *Dickerson v. United States*, 530 U.S. 428, 443 (2000), they were deemed to meet the AEDPA requirement of "clearly **established** Federal law." 28 U.S.C. § 2254 (2006)(d)(1) (emphasis added).

If becoming "part of our national culture" is a valid measure of law having become "clearly established," why is it not a valid measure of religion having become "clearly established" as well? In other words, why was the opposite argument made in *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), where the fact that "the practice of opening legislative

sessions with prayer has become part of the fabric of our society" was "not, in these circumstances, an 'establishment' of religion or a step toward establishment"? *Id.* By either explaining why religion is different from law, or by concluding that the two should, in fact, be treated similarly, this unaddressed inconsistency (which goes to the heart of the "disarray" problem) can be resolved in this case.

Inconsistency is found not only in the opinions of the Court as a whole, but in the writings of many of its individual members. For instance, although Justice O'Connor argued that courts must be vigilant as to "the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others," *Allegheny County*, 492 U.S. at 627-28 (1989) (O'Connor, J., concurring), she blatantly showed favoritism to Monotheism and conveyed a message of disapproval to Atheism over a two-decade span. *See Lynch v. Donnelly*, 465 U.S. at 693 (O'Connor, J., concurring) (contending that "acknowledgements" of God "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *See also Elk Grove*, 542 U.S. at 36 (O'Connor, J., concurring) (reiterating this highly derogatory argument). Similarly, although she advised that "when [government] acts it should do so without endorsing a particular religious belief or practice that all citizens do not share," *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring), she found no problem with the government's official Pledge of

Allegiance, which (since 1954) has been endorsing a belief in the existence of God. *Elk Grove*, 542 U.S. at 33-45. Obviously, all citizens do not share that religious belief.

Although Justice Scalia has also bemoaned the "utter inconsistency of our Establishment Clause jurisprudence," *McCreary*, 545 U.S. at 900 n.8 (Scalia, J., dissenting), he, too, has engaged in paradoxical opinions. In *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), for example, he penned that "government may not ... lend its power to one or the other side in controversies over religious ... dogma." Does the government not lend its power to one side in the greatest religious dogma controversy of all – i.e., whether or not God exists – when it helps "the overwhelming majority of religious believers ... to give God thanks and supplication *as a people*, and with respect to our national endeavors," *McCreary*, 545 U.S. at 900 (Scalia, J., dissenting), especially when it does so while intentionally choosing to "disregard" those with contrary religious views? *Id.* at 893.

This implicates another problem that has been mentioned: "bias [of] this Court according to the religious and cultural backgrounds of its Members." *Allegheny County*, 492 U.S. at 614 n.60 (1989). Surely no Court with nine Atheist justices would approve of the many endorsements of Monotheism now engaged in by government. And, just as surely, neither Justice Scalia nor any of the other Catholic justices (now comprising a majority of the Court) would ever find that the Constitution permits the disregard of devout Catholics, even though, at the founding of this nation, Catholics were the Atheists

of the day. In other words, comprising less than one percent of the population,[12] Catholics most certainly would have been subject to "disregard" by the overwhelming majority of that era's religious believers, who readily would have given God thanks and supplication *as a Protestant Christian people*. In fact, when the federal Constitution was ratified, four of the colonies had explicitly Protestant state constitutions,[13] and legislative provisions depriving Catholics of basic rights either were in existence or had recently been in existence in every one of the other nine original colonies.[14] Furthermore, the Continental Congress had written to the people of Great Britain as "their affectionate *protestant* brethren,"[15] referring to Catholicism as "a religion that has deluged your island in blood, and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world."[16]

In *McCreary*, 545 U.S. at 893 (Scalia, J., dissenting), Justice Scalia also discussed "public acknowledgment of the Creator," as if the existence of that "Supreme Being" is without dispute. In so doing, he certainly seemed to presume to determine the plausibility of God's existence. Yet, "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." *Smith*, 494 U.S. at

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[12] Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?* 38 Cap. U. L. Rev. 409, 488 (2009).

[13] *Id.* at 480.

[14] *Id.* at 486.

[15] 1 Journals of the Continental Congress, 1774–1789, at 82 (Worthington Chauncey Ford ed., 1904) (emphasis added).

[16] *Id.* at 88.

887. Likewise, when belief in God was at issue, Justice Scalia wrote that "[t]he indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial." *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). Are Atheists not singled out for special burdens on the basis of their religious calling when they are forced to countenance the government's spatchcocking of Monotheism into their business transactions and their group pledges of allegiance? *See McCreary*, 545 U.S. at 889 (Scalia, J., dissenting).

Perhaps the greatest inconsistency in Justice Scalia's opinions relates to his review of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857). In that opinion, Chief Justice Taney fossicked through the nation's history to justify treating a racial minority as less deserving than the white majority. According to Justice Scalia, the Court was "covered with dishonor and deprived of legitimacy" as a result. *Planned Parenthood v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., concurring and dissenting). Yet, in *McCreary*, Justice Scalia engaged in a virtually identical process to conclude that "the Establishment Clause ... permits the disregard of devout atheists." 545 U.S. at 893 (Scalia, J, dissenting). In reality, the only significant difference between the two opinions is that one involved race and the other involved religion. This is interesting inasmuch as Justice Scalia also remarked, "Just as we subject to the most exacting scrutiny laws that make classifications based on race, ... so too we strictly scrutinize

governmental classifications based on religion." *Smith*, 494 U.S. at 886 n.3 (citations omitted).

Also finding *Dred Scott* to be deeply flawed was Justice Thomas. In a law review article written prior to his tenure as a justice of this Court, then-EEOC Chairman Thomas wrote that Chief Justice Taney placed a "twist ... on the beginning of the Declaration of Independence" in order to conclude that Blacks could be treated unequally. Clarence Thomas, *An Afro-American Perspective: Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation*, 1987 How. L.J. 691, 692 (1987). The fact is, however, that the Chief Justice's argument in *Dred Scott* was identical to the one used by the Court in, for example, *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("historical evidence sheds light not only on what the draftsmen intended the [given] Clause to mean, but also on how they thought that Clause applied to the [given] practice ... -- their actions reveal their intent"). Although Justice Thomas appears to believe *Marsh* was correctly decided, *see, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 858 (1995) (Thomas, J., concurring), he wrote that this method of interpretation – i.e., using the practices of those who wrote the given document as determinative of intent – is trumped when the result contradicts our society's higher aspirations: "[T]he strength of those universal principles of equality and liberty provides the means for resolving contradictions between principle and practice." 1987 How. L. J. at 702.[17]

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[17] *Marsh*, incidentally, is a root cause of the "disarray" in which the Court finds itself. An Establishment Clause case in which

Unfortunately, this reverence for equality and liberty seems to be downplayed by Justice Thomas when religious belief, rather than race, is at issue. Thus, whereas he has argued that "[g]overnment ... cannot make us equal; it can only recognize, respect, and protect us as equal before the law" in *Adarand Constructors v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring), he has also cast aside the "principle of inherent equality that underlies and infuses our Constitution," *id.*, when, for instance, an Atheist father objected to public school teachers asking his child and her classmates to join every school day in "an affirmation that God exists." *Elk Grove*, 542 U.S. at 48 (Thomas, J., concurring). Similarly, when race was at issue, Justice Thomas had no apparent fear that ending assistance to a *minority* "thought to be disadvantaged," *Adarand*, 515 U.S. at 240, might be interpreted as hostility towards its members. Yet, when religion was the focus, this concern seemed to loom large, even though what was being ended was governmental activity espousing the views of a favored *majority*. "[T]he message sent by removal of the [government-sponsored religious] sign or display ... may well appear to him to be an act hostile to his religious faith." *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring).

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the majority opinion contained not a word about what the Clause was intended to achieve, the continued validity of *Marsh* appears to be in question. In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000), six members of the Court implicitly disavowed the *Marsh* holding: "[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."

Justice Breyer's Religion Clause jurisprudence seems self-contradictory as well. Although he recognizes the importance of "[j]udges ... resist[ing] popular pressure to suppress the basic rights of an unpopular minority," *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3124 (2010) (Breyer, J., dissenting), he appears willing to allow suppression of those rights when the unpopular minority consists of Atheists. For them, the governmental support of "a religious message, invoking, indeed emphasizing, the Deity," *Van Orden v. Perry*, 545 U.S. 677, 700-01 (2005) (Breyer, J., concurring), should simply be accepted. Apparently this is appropriate (at least in part) because Justice Breyer is "unaware of any ... climate of intimidation" against Atheists. *Id.* at 702.

Even ignoring the rather surprising suggestion that an Establishment Clause violation is measured by the degree of intimidation suffered, this admission is further reason to grant certiorari. It seems that the justices have forgotten about the extensive anti-Atheistic bias that was prominent while "In God We Trust" was being secured. More importantly, they seem oblivious to the many ways in which that bias has continued to pervade the nation. The Complaint and its numerous appendices detail only a portion of these reprehensible circumstances. *See* pages 21-25, *infra*.

It is doubtful that any justice of this Court would uphold the inscribing of "In Jesus We Trust" or "In Protestant Christianity We Trust" on the nation's money. Thus, one would expect a justice who has written, "The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more

specific creeds strikes us as a contradiction that cannot be accepted," *Lee v. Weisman*, 505 U.S. 577, 590 (1992), would find "In God We Trust" to be an Establishment Clause violation as well. After all, as Justice Kennedy readily recognized (after taking issue with Justice O'Connor's "only ways" comment in *Lynch* (*see* at page 13, *supra*)):

> [I]t borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" ... [when] "In God We Trust" ... is reproduced on every coin minted and every dollar printed by the Federal Government ... [sending] the clear message that his faith is out of step with the political norm.

Allegheny County, 492 U.S. at 673-74 (Kennedy, J., concurring and dissenting). Justice Kennedy is thus fully aware of how governmental practices such as those at issue in this case violate the Constitution's ideals. Yet he is quite capable of trivializing the resultant injuries, describing them as "mere feelings of exclusion," *id.* at 673, and ultimately concluding that to "invalidate [such] practices ... is [not] acceptable." *Id.* at 674. Inasmuch as he invalidated such a practice in *Lee*, the muddled nature of his disparate arguments seems ripe for clarification.

Also ripe for clarification is the muddled nature of how to apply the core principle of religious freedom – i.e., equal protection – in the cases that arise. Again, we can look to Justice Kennedy, who obviously sees the importance of this approach. *See*,

e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) ("[T]he Establishment Clause mirrors the Equal Protection Clause ... [in that t]he danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial"); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993) (determining the government's objectives in religion cases should be done "as in equal protection cases"). Surely, under an equal protection analysis, every lawful religious view deserves equivalent respect from the government. Just as surely, however, it cannot be gainsaid that the respect shown to those who disbelieve in God is anything but equal to the respect shown to Monotheists when the government proclaims, "In God We Trust." Thus (again) Justice Kennedy's contention that it is not "acceptable" to remedy this inequity, *Allegheny County*, 492 U.S. at 674, like the contentions of the other justices, lacks consistency.

Resolving these many contradictions is essential if the lower courts are to have the guidance necessary to produce a consistent (and, hopefully, just) national Establishment Clause jurisprudence.

II. "IN GOD WE TRUST" PERPETUATES THE DISENFRANCHISEMENT OF THE NATION'S MOST DESPISED MINORITY

Atheists are viewed unfavorably by more than half of their fellow Americans merely on the basis of their deeply-felt religious views.[18] Almost as many

[18] Accessed at http://pewforum.org/Public-Expresses-Mixed-Views-of-Islam-Mormonism.aspx on December 11, 2010.

feel that disbelief in God precludes someone from being moral.[19] Accordingly, "Americans draw symbolic boundaries that clearly and sharply exclude atheists in both private and public life."[20] "[N]ot only [are] atheists ... less accepted than other marginalized groups but ... attitudes toward them have not exhibited the marked increase in acceptance that has characterized views of other racial and religious minorities over the past forty years."[21]

These facts comport with this Court's allusions to "the power, prestige and financial support of government," *Engel v. Vitale*, 370 U.S. 421, 431 (1962), and the notion that this is not just a platitude, but a deeply meaningful phrase that highlights factors with real consequences. Although certainly not a definitive proof of cause and effect, this would explain why, when Congress in the 1950s finally ended 300-plus years of the government's "power, prestige and financial support" for our white citizenry, the percentage of those refusing to vote for a black candidate decreased a remarkable 92% (from 53% to 4%) within two generations.[22] Similarly, after

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[19] Poll conducted by the Pew Research Center, March 20, 2002, entitled, *Americans Struggle with Religion's Role at Home and Abroad*. Accessed on December 11, 2010 at http://people-press.org/reports/display.php3?ReportID=150.

[20] Edgell P, Gerteis J, and Hartmann D. *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*. American Sociological Review (April, 2006) Vol. 71, pages 211-34 at 212.

[21] *Id.*

[22] Polls given July 30-August 4, 1958 and February 19-21, 1999. Copyright: The Gallup Organization, Princeton, NJ. A.I.P.O. *See* www.gallup.com and www.gallupjournal.com.

the civil rights laws ended the official gender discrimination that pervaded the nation from prior to its founding, those refusing to vote for a woman decreased from 41% to 7%.[23] Yet for Atheists – with government continuing to send messages (such as "In God We Trust") that disfavor their religious views – the percentage of those refusing to vote for them has remained extraordinarily high, with the last Gallup poll showing the figure to be 53%.[24] As interpreted by the pollsters, "An atheist would seem to have the hardest time getting elected president, as a majority of Americans (53%) say they would not vote for a presidential candidate who was an atheist."[25]

Petitioner included in his Complaint a mass of information – unchallenged by Defendants – that reveals blatant examples of official anti-Atheist bias that could only have transpired in a pro-Monotheistic, anti-Atheistic milieu. *See* FAC Appendices B-I (EOR 184-239). He provided a survey demonstrating that a large majority of Americans view "In God We Trust" as (i) being a religious statement, (ii) endorsing a belief in God, and (iii) endorsing religion over Atheism. FAC Appendix N (EOR 272-77). He showed how Americans have used

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[23] *Id.*

[24] Poll given February 9-11, 2007. Accessed on December 11, 2010 at http://www.gallup.com/poll/26611/Some-Americans-Reluctant-Vote-Mormon-72YearOld-Presidential-Candidates.aspx.

[25] *Id.* Even 53% may underestimate the animus. In a poll conducted a month later by Newsweek/MSNBC, 62% of registered voters said they would not vote for a candidate who is an atheist. Newsweek poll, conducted March 28-29, 2007, accessed at http://www.newsweek.com//2007/03/30/god-s-numbers.html on December 11, 2010.

that motto almost exclusively in purely religious terms, and how that use has markedly increased over the past two decades. FAC Appendix P (EOR 293-305). Additionally, he brought to the lower courts' attention the case of *a federal district court chief judge* denying citizenship to a perfectly fit individual solely on the basis of that applicant's Atheism (specifically alluding to "In God We Trust" on the money to justify his decision). *Petition of Plywacki*, 107 F. Supp. 593 (D. Haw. 1952).[26]

At first glance, such a decision might appear anomalous. However, when it is realized that it took place during an era when the "In God We Trust" motto was being glorified, when the President was proclaiming that "Recognition of the Supreme Being is the first, the most basic, expression of Americanism,"[27] when this Court was equating Atheism with "subversive influences," *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 109 (1952), and when the Chief Justice was decreeing that America is "a Christian land governed by Christian principles,"[28] that judicial abuse is not surprising at all.

Regretfully, similar sentiments, expressed by our officials, have hardly disappeared. A presidential

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[26] FAC Appendix O (EOR at 278-92) has a thorough exegesis of this case.

[27] Statement of President Eisenhower made during a nationally televised address on February 20, 1955 in conjunction with the American Legion's "Back-to-God" program. Will Herberg, *Protestant – Catholic – Jew: An Essay in American Religious Sociology* 274 (1955). *See also* 3 Martin E. Marty, *Modern American Religion* 296 (1986).

[28] *Eisenhower Joins in a Breakfast Prayer Meeting*, New York Times, February 5, 1954, A-10.

claim that, "Without God, there is no virtue"[29] is hurtful to Atheists, as is the nation (while being characterized as a "beacon of religious freedom") celebrating a national motto that excludes them on the basis of their religious beliefs.[30] Likewise, hearing their Congressmen unabashedly favor Monotheism[31] while watching their tax-dollars go to a congressional chaplain who contends that "this Chamber proclaims what America prays: 'In God we trust' now and forever"[32] is less than endearing.

As the "barrier to the encroachments and oppressions of the representative body,"[33] the Court should grant this Petition to review the institutionalized prejudices suffered by our Atheistic citizens. After all, "this sort of noneconomic injury is one of the most serious consequences of discriminatory government action." *Allen v. Wright*, 468 U.S. 737, 755 (1984). In other words, it is an apt time for the Court to ensure that government is not perpetuating "the concrete harm [that] can never be dismissed as insubstantial," *Locke v. Davey*, 540 U.S. at 731 (Scalia, J., dissenting), as that harm is imposed upon a religious minority that is already disenfranchised due to past governmental acts.

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[29] Remarks of President Reagan, August 23, 1984 (as quoted in House Document 108-227, 108th Cong. 2nd Sess. *Ronald Reagan, Late a President of the United States* at 114).

[30] July 27, 2006 Proclamation of President George W. Bush, celebrating the 50th Anniversary of the national motto. Accessed at http://georgewbush-whitehouse.archives. gov/news/releases/2006/07/20060727-12.html on December 11, 2010.

[31] *See* EOR 306-08.

[32] Monday, July 25, 2005 Prayer of House Chaplain Rev. Daniel P. Coughlin. 151 Cong. Rec. H6386.

[33] The Federalist No. 78 (Alexander Hamilton).

III. THE NINTH CIRCUIT'S RFRA RULING CONFLICTS WITH THIS COURT'S JURISPRUDENCE (AND THUS, AS EXPECTED, CONFLICTS WITH THE JURISPRUDENCE OF ITS SISTER CIRCUITS)

In response to this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-2000bb-4 (2006). Although the Court invalidated that act as it pertains to the states, *City of Boerne v. Flores*, 521 U.S. 507 (1997), its restrictions upon the federal government remain. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

RFRA "prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1(b)." *O Centro*, 546 U.S. at 423. Nonetheless, as a result of the Ninth Circuit's adherence to *Aronow* in this case, binding precedent has now been established that emasculates RFRA. This precedent is contrary to the holding of *O Centro*, and (as expected) conflicts with the jurisprudence of other circuits.

O Centro involved "[a] religious sect with origins in the Amazon Rainforest [that] receives communion by drinking a sacramental tea, brewed from plants unique to the region, that contains a hallucinogen regulated under the Controlled Substances Act by the Federal Government." 546

U.S. at 423. The Act serves to police the distribution of substances with "a substantial and detrimental effect on the health and general welfare of the American people." 21 USCS § 801(2) (2006). Accordingly, under the Act, the government sought to block the importation of the tea. Despite this clearly legitimate goal, the Court unanimously[34] held "that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring" the use of the hallucinogen. 546 U.S. at 439.

To whatever degree interference with the *O Centro* sect's tea drinking substantially burdened their exercise of religion, the interference with Atheists' ability to solicit, collect and spend money for their religious ends is at least as severe. Believing themselves to be included among the "We," in "In God We Trust," Petitioner here and other "devout atheists," *McCreary*, 545 U.S. at 893 (Scalia, J., dissenting), are forced to choose between not using what is often the only available legal tender and committing what they consider blasphemy. Absent a compelling governmental interest, RFRA does not permit the imposition of such a choice:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a

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[34] Justice Alito took no part in the consideration or decision of the case.

> fine imposed against appellant for her Saturday worship.

Sherbert v. Verner, 374 U.S. 398, 404 (1963). Given that the government was unable to show a compelling interest when the flow of potentially dangerous, mind-altering drugs was at issue in *O Centro*, it surely cannot show a compelling interest in the case at bar, where there has never even been a suggestion that such an interest exists.

With its failure to follow *O Centro*, it is not surprising that the instant case conflicts with rulings of other circuits. In *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2nd Cir. 2007), for example, the Second Circuit reversed a zoning board's denial of a religious school's request for a permit to enlarge its facilities. Analyzing the case under RFRA's cousin, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-2000cc-4 (2006), the *Westchester* panel ruled in favor of the school. Even though legitimate traffic and safety concerns existed, the Second Circuit found that "once a religious institution has demonstrated that its religious exercise has been substantially burdened, the burden of proof shifts to the municipality to prove it acted in furtherance of a compelling governmental interest and that its action is the least restrictive means of furthering that interest." 504 F.3d at 354. Because the defendant village did not "show a compelling interest in imposing the burden on religious exercise in the particular case at hand," *id.*, that burden of proof was not met.

Unlike in *Westchester*, the government prevailed in *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), which involved a Native American criminal defendant who relied on RFRA to defend his shooting of a bald eagle. At issue was whether the federal statute that protected the eagle trumped the RFRA rights of the defendant, who was attempting to fulfill the requirements of a religious ceremony. Referencing *O Centro*, the Tenth Circuit noted that "[o]nce a defendant shows that applying a statute to him will substantially burden his religion, the government must justify the burden by establishing a sufficiently compelling interest and showing that it could not accommodate religion more without serving that interest less." 525 F.3d at 946. Only because the defendant did not use the procedures that were in place (which would have provided him with an opportunity to legally obtain protected eagle parts), was he unable to prevail on his RFRA claim.

The instant case obviously conflicts with *Friday*, as it does with *Westchester* and *O Centro*. Basing its decision on the Establishment Clause holding of *Aronow*, the Ninth Circuit ignored the mandates of RFRA (which was implemented, of course, long after *Aronow* was decided). To allow that 1970 case, therefore, to serve as circuit precedent for a RFRA claim, when the requirements of RFRA have never been met, is clear error. More importantly, with the instant case (based on *Aronow*) now the law of the Ninth Circuit, meeting RFRA's requirements will no longer be necessary anywhere within that Court of Appeals' vast boundaries. Thus, not only Atheists, but all individuals, whatever their religious

persuasions, have lost the protections that Congress intended to provide.

As for the underlying claim that the motto "has nothing whatsoever to do with the establishment of religion[,] ... is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise," *Aronow*, 432 F.2d at 243, statistics (in addition to history and common sense) demonstrate its patent falsity. *See* Plaintiff-Appellant's Petition for Panel Rehearing or for Rehearing En Banc at 15-16 (Docket Entry 114-1 at 21-22) (showing that when "In God We Trust" has been raised by members of this Court, it has almost always been in the context of Establishment Clause concerns). But even if one accepts this "nothing whatsoever to do with the establishment of religion" contention (and also opts to ignore that the *Aronow* plaintiff lacked standing and submitted an "unintelligible" complaint), Petitioner's RFRA claim still ought to survive. As demonstrated with the Controlled Substances Act in *O Centro*, the zoning regulations in *Westchester*, and the Eagle Protection Act under which the defendant was charged in *Friday*, RFRA claims are not at all dependent upon a showing of governmental religiosity. On the contrary, "laws 'neutral' toward religion" are what RFRA addresses. 42 U.S.C. § 2000bb(a)(2). Thus, again, the Ninth Circuit's ruling, if permitted to stand, threatens to burden the exercises of religion that Congress sought to protect when it passed RFRA (and that this Court sought to protect when it upheld RFRA in *O Centro*).

CONCLUSION

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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APPENDIX

No. _____

IN THE
Supreme Court of the United States

MICHAEL A. NEWDOW,

Petitioner,

v.

PETER LEFEVRE, LAW REVISION COUNSEL. *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Appendix A

Court of Appeals' Opinion Filed March 11, 2010

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,
Plaintiff-Appellant,

v.

PETER LEFEVRE, Law Revision Counsel; UNITED STATES OF AMERICA; HENRY M. PAULSON, JR.,* Secretary of the Treasury; HENRIETTA HOLSMAN FORE, Director, United States Mint; THOMAS A. FERGUSON, Director, Bureau of Engraving and Printing; THE CONGRESS OF THE UNITED STATES OF AMERICA,
Defendants-Appellees,

PACIFIC JUSTICE INSTITUTE,
Defendant-Intervenor-Appellee.

No. 06-16344
D.C. No.
CV-05-02339-FCD
OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

*Henry M. Paulson, Jr. is substituted for his predecessor, John W. Snow, as Secretary of the Treasury, pursuant to Fed. R. App. P. 43(c)(2).

Argued and Submitted
December 4, 2007—San Francisco, California

Filed March 11, 2010

Before: Dorothy W. Nelson, Stephen Reinhardt, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea;
Concurrence by Judge Reinhardt

COUNSEL

Michael A. Newdow (argued), in pro per, Sacramento, California; for the plaintiff-appellant.

Peter D. Keisler, McGregor W. Scott, Robert M. Loeb, Lowell V. Sturgill Jr. (argued), Department of Justice, Washington, D.C.; for defendants-appellees the United States of America *et al.*

Kevin T. Snider (argued), Pacific Justice Institute, Sacramento, California; for defendant-intervenor-appellee Pacific Justice Institute.

Norman Goldman, Law Office of Norman Goldman, Los Angeles, California; for Atheists and Other Freethinkers as Amicus Curiae in Support of plaintiff-appellant.

Edward L. White III, Thomas More Law Center, Ann Arbor, Michigan; for the Thomas More Law Center as Amicus Curiae in Support of the defendants-appellees.

Erik W. Stanley, Mary E. McAlister, Liberty Counsel, Lynchburg, Virginia; Mathew D. Staver, Anita L. Staver, Liberty Counsel, Maitland, Florida; for Liberty Counsel as Amicus Curiae in Support of the defendants-appellees.

Jay Alan Sekulow, Stuart J. Roth, Colby M. May, Shannon Demos Woodruff, American Center for Law and Justice, Washington, D.C.; Douglass S. Davert, David C. Loe, Davert & Loe, Long Beach, California; John Casoria, Law Office of John Casoria, Coto de Caza, California; for American Center for Law and Justice et al. as Amici Curiae in Support of the defendants-appellees.

Roy S. Moore, Gregory M. Jones, Benjamin D. Dupré, Foundation for Moral Law, Montgomery, Alabama; for the Foundation for Moral Law as Amicus Curiae in Support of the defendants-appellees.

Gary G. Kreep, Vicki A. Rothman, D. Colette Wilson, United States Justice Foundation, Ramona, California; for the United States Justice Foundation *et al.* as Amici Curiae in Support of the defendants-appellees.

Steven W. Fitschen, Barry C. Hodge, The National Legal Foundation, Virginia Beach, Virginia; for Wallbuilders, Inc., as Amicus Curiae in Support of the defendants-appellees.

OPINION

BEA, Circuit Judge:

This case calls upon us to decide whether the national motto of the United States, "In God We Trust," and its inscription on the Nation's coins and currency, violates the Establishment Clause of the First Amendment or the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*, or both. We hold our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), forecloses both claims. Accordingly, we affirm the district court's order dismissing this case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

I. Factual and Procedural Background

Plaintiff Michael A. Newdow ("Newdow") is an ordained minister and founder of the First Amendmist Church of True Science ("FACTS").

Newdow and the members of FACTS are Atheists "whose religious beliefs are specifically and explicitly based on the idea that there is no god."

This case is part of a group of lawsuits Newdow has started challenging various government-sanctioned references to God.[1] In this action, Newdow alleges the statute that establishes "In God We Trust" as the national motto, 36 U.S.C. § 302,[2] and the statutes that require the motto's inscription on the Nation's coins and currency, 31 U.S.C. §§ 5112(d)(1),[3] 5114(b),[4] violate the Establishment Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb et seq.[5] Newdow asks this court to declare §§ 302, 5112(d)(1), and 5114(b) violate the Establishment Clause and RFRA. Newdow also requests injunctive relief to enjoin the Defendants from inscribing the motto on coins and currency, placing in the United States Code any act or law that

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[1] Named as Defendants in this case are the United States of America, the Congress of the United States of America, the Law Revision Counsel, the Secretary of the Treasury, the Director of the United States Mint, and the Director of the Bureau of Engraving and Printing ("Defendants"). The district court allowed the Pacific Justice Institute, a "Sacramento-based, nonprofit organization dedicated to defending religious and civil liberties," to intervene as a defendant.

[2] " 'In God we trust' is the national motto." 36 U.S.C. § 302.

[3] "United States coins shall have the inscription 'In God We Trust.' " 31 U.S.C. § 5112(d)(1).

[4] "United States currency has the inscription 'In God We Trust' in a place the Secretary decides is appropriate." 31 U.S.C. § 5114(b).

[5] Newdow also brought claims under the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause, but he has abandoned those claims on appeal.

references the motto, and "such and other further relief" as this court deems proper.

The Defendants filed a motion to dismiss Newdow's action under Federal Rule of Civil Procedure 12(b)(6). In their motion, the Defendants contended, inter alia, Newdow lacks standing to sue; his Establishment Clause claim is foreclosed by Ninth Circuit precedent; and he failed to allege facts sufficient to state a RFRA claim.

The district court granted the Defendants' Rule 12(b)(6) motion to dismiss. As an initial matter, the district court held Newdow had standing to bring his claims. According to the district court, Newdow suffered a cognizable injury-in-fact because the motto forced him repeatedly to confront a religious symbol he found offensive. The district court further held a judicial declaration that the motto is unconstitutional would redress this injury.

The district court dismissed the Legislative Branch Defendants (Congress and the Law Revision Counsel) as immune from suit under the Speech and Debate Clause of Article I of the United States Constitution. See U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."). Newdow did not appeal this ruling.

Turning to the merits of the case, the district court held our decision in *Aronow* forecloses Newdow's Establishment Clause claim. The district court held *Aronow* also bars Newdow's RFRA claim, because the RFRA claim rests on Newdow's

"assertion that the motto is blatantly religious" and thus "simply restate[s]" the Establishment Clause claim. Therefore, the district court dismissed Newdow's complaint for failure to state a claim upon which relief can be granted.

Newdow's timely appeal to this court followed.

II. Standard of Review

We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). When we review the grant of a motion to dismiss, "we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Id.*

III. Standing

[1] The Defendants contend Newdow lacks standing to challenge the statutes that adopt "In God We Trust" as the national motto and require its inscription on coins and currency.[6] The "irreducible constitutional minimum of standing" contains three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

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[6] Standing to bring a RFRA challenge is "governed by the general rules of standing under article III of the Constitution," 42 U.S.C. § 2000bb-1(c), so our standing analysis in this section applies equally to Newdow's Establishment Clause and RFRA claims.

[2] Newdow has standing to challenge the statutes that require the inscription of the motto on coins and currency, 31 U.S.C. §§ 5112(d)(1) and 5114(b). Newdow alleges—given the ubiquity of coins and currency in everyday life—the placement of "In God We Trust" on the Nation's money forces him repeatedly to encounter a religious belief he finds offensive. Under our precedent, "spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing." *Vasquez v. L.A. County*, 487 F.3d 1246, 1253 (9th Cir. 2007). That Newdow's encounters with the motto are common to all Americans does not defeat his standing, because Newdow has alleged a concrete, particularized, and personal injury resulting from his frequent, unwelcome contact with the motto. *See FEC v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.' "). Further, Newdow's unwelcome contact with the national motto is caused by the statutes requiring the placement of the motto on coins and currency, and is redressable by an injunction ordering the removal of the motto from coins and currency.[7] Thus, Newdow satisfies all three

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[7] The Defendants contend Newdow's injury is not redressable because he requests injunctive relief that would prohibit the Defendants from continuing to place the motto on coins and currency in the future. This injunction, the Defendants assert, would leave untouched the vast quantities of currency already in circulation and thus would not "appreciably reduce" Newdow's exposure to the motto. Nevertheless, Newdow's complaint also asks for "such and other further relief" as we may deem proper, which could include an injunction requiring the replacement of currency already in circulation.

requirements for Article III standing as to his challenge to §§ 5112(d)(1) and 5114(b).[8]

[3] Nevertheless, Newdow lacks standing to challenge 36 U.S.C. § 302, which merely recognizes "In God We Trust" is the national motto.[9] Unlike §§ 5112(d)(1) and 5114(b), § 302 does not authorize or require the inscription of the motto on any object. Without §§ 5112 and 5114, the motto would not appear on coins and currency, and Newdow would lack the "unwelcome direct contact" with the motto that gives rise to his injury-in-fact. Although Newdow alleges the national motto turns Atheists into political outsiders and inflicts a stigmatic injury upon them, an "abstract stigmatic injury" resulting from such outsider status is insufficient to confer

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[8] The Defendants assert Newdow is collaterally estopped from alleging the placement of the motto on coins and currency causes him an injury-infact. In support, the Defendants cite our decision in *Newdow v. Bush*, 89 F. App'x 624 (9th Cir. 2004) (unpublished memorandum disposition), where we held Newdow lacked Article III standing to bring an Establishment Clause challenge to clergy-led prayer at the 2001 presidential inauguration, because Newdow failed to allege a "sufficiently concrete and specific injury." The Defendants' collateral estoppel argument lacks merit because *Newdow v. Bush* involved a different Establishment Clause challenge from the present case. *See Blackfoot Livestock Comm'n Co. v. Dept' of Agriculture, Packers & Stockyards Admin.*, 810 F.2d 916, 922 (9th Cir. 1987) (holding a party cannot invoke collateral estoppel if "the factual issues litigated were different from those in the present case").

[9] During oral argument, Newdow conceded he could not establish standing to challenge § 302, were it not for the statutes requiring the inscription of the motto on coins and currency. Oral Argument (Dec. 4, 2007) at 7:00-8:30.

standing. See Allen v. Wright, 468 U.S. 737, 755-56 (1984).

Newdow alleges, however, the injury caused by the national motto is personal, because he was "recently refused a job because of the [misperception] of his activism" and has given up hope of obtaining elected office because of government-perpetuated anti-Atheism bias. Nevertheless, these claims are insufficient to establish standing, because Newdow cannot show these claimed injuries are traceable to the Defendants, and not to the actions of third parties who are not before this court—i.e., the employer who denied Newdow a job or the electorate whom Newdow alleges would not elect him to public office.[10] *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28, 41-42 (1976) (holding the indigent plaintiffs lacked standing to challenge an Internal Revenue Service Ruling that provided favorable tax treatment to hospitals who denied certain services to indigents, because it was "purely speculative" whether the denials of service could be traced to the Revenue Ruling or, instead, to decisions made by the hospitals without regard to any tax implications).

[4] In sum, Newdow lacks standing to challenge § 302, but has standing to challenge §§ 5112(d)(1) and 5114(b).

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[10] Further, Newdow does not allege he ever sought public office, so any injury resulting from his failure to attain public office is purely hypothetical and insufficient to show injury-in-fact. *See Lujan*, 504 U.S. at 560 (holding an injury must be "concrete and particularized," and not "conjectural" or "hypothetical," to give rise to Article III standing).

IV. The Establishment Clause

[5] The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause prohibits the enactment of a law or official policy that "establishes a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

Newdow alleges the placement of "In God We Trust" on coins and currency violates the Establishment Clause. According to Newdow, the motto unconstitutionally places the government's imprimatur on a belief in a monotheistic God. Newdow further alleges the national motto turns him and other Atheists into political outsiders by reinforcing the "twin notions that belief in God is 'good,' and disbelief in God is 'bad.' " Thus, Newdow asserts the statutes requiring the inscription of the motto on coins and currency run afoul of the Establishment Clause.

[6] Newdow's Establishment Clause claim is foreclosed by our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). In *Aronow*, we held the national motto, "In God We Trust," and the statutes requiring its placement on coins and currency, do not violate the Establishment Clause. *Id.* at 243. We reasoned:

> It is quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion.

> Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.
>
> * * *
>
> It is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted 'In God We Trust' or the study of a government publication or document bearing that slogan. . . . While 'ceremonial' and 'patriotic' may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact. As stated by the Congressional report, it has 'spiritual and psychological value' and 'inspirational quality.'

Id. at 243-44 (footnotes omitted).[11]

Newdow concedes his Establishment Clause challenge is "essentially identical" to the one raised

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[11] Our sister circuits are in accord with *Aronow*. Indeed, every circuit to address the question has held the national motto does not violate the Establishment Clause. *See, e.g., Lambeth v. Bd. of Comm'rs of Davidson County, North Carolina*, 407 F.3d 266, 270-73 (4th Cir.), *cert. denied*, 546 U.S. 1015 (2005); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir.), *cert. denied*, 517 U.S. 1211 (1996); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979).

in *Aronow*, but contends *Aronow* is not binding precedent. As a general rule, we, as a three-judge panel, are without authority to "overrule a circuit precedent; that power is reserved to the circuit court sitting en banc." *Robbins v. Carey*, 481 F.3d 1143, 1149 n.3 (9th Cir. 2007). Nevertheless, "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

Newdow asserts the reasoning and theory of *Aronow* is "clearly irreconcilable" with intervening Supreme Court precedent. According to Newdow, the Supreme Court's Establishment Clause jurisprudence went through significant changes since *Aronow* was decided. Specifically, Newdow notes all of the Establishment Clause tests with which he asserts "In God We Trust" is "incompatible" were developed by the Supreme Court after *Aronow* was decided. Therefore, Newdow contends *Aronow* is no longer binding precedent.

[7] We disagree. That the Supreme Court has developed new Establishment Clause tests does not render *Aronow* "clearly irreconcilable" with Supreme Court precedent. Newdow did not and cannot cite a single Supreme Court case that called into question the motto's constitutionality or otherwise invalidated *Aronow*'s reasoning or theory. To the contrary, and consistent with *Aronow*, the Supreme Court has

noted in dicta the national motto does not violate the Establishment Clause. *See County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989) (noting the motto is "consistent with the proposition that government may not communicate an endorsement of religious belief"); *Lynch*, 465 U.S. at 676 (noting the "statutorily prescribed national motto 'In God We Trust' " is a constitutional "reference to our religious heritage"); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) ("Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding." (citation and internal quotation marks omitted)).

Alternatively, Newdow asserts *Aronow* is not binding precedent because the district court in *Aronow* held the "plaintiff, as a taxpayer and citizen, lacked standing to challenge the validity of the statutes." *Aronow*, 432 F.2d at 243. On appeal, however, the *Aronow* court decided the merits of the Establishment Clause claim after assuming, but without deciding, the plaintiff had standing. *Id.* Newdow contends *Aronow*'s failure to address the standing question renders it without precedential value, because a court lacks subject matter jurisdiction without Article III standing. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc).

[8] This contention is without merit. The Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), decided after *Aronow*, invalidated the practice of "hypothetical

jurisdiction"—i.e., assuming jurisdiction for the purpose of deciding the merits of a case. *Id.* at 93-94. After *Steel Co.*, a court cannot do what the *Aronow* court did: address the merits of a case without ensuring it has jurisdiction over the case. Nevertheless, the Supreme Court in *Steel Co.* did not overturn the holdings of every case that had been decided using the "hypothetical jurisdiction" approach; *Steel Co.* held only that courts may not decide cases using that approach in the future. Thus, *Aronow*'s failure to address whether the plaintiff had standing does not undermine the precedential value of its holding that the national motto does not violate the Establishment Clause.

[9] Accordingly, Newdow's Establishment Clause challenge is foreclosed by *Aronow*.

V. Religious Freedom Restoration Act of 1993 ("RFRA")

[10] Under RFRA, the government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can show the rule is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that governmental interest. 42 U.S.C. § 2000bb-1. Newdow alleges the inscription of "In God We Trust" on coins and currency substantially burdens the free exercise of his religion in two primary ways. First, because Newdow's religion prohibits him from carrying currency that bears the motto "In God We Trust," Newdow is impeded in his ability to engage in religious activities that require

cash payments — *e.g.*, purchase of church attire, ingredients for the church libation "The Freethink Drink," and books for the church library; travel for religious purposes to locations that require cash payments; and raise funds through cash donations. Second, because Newdow cannot entirely avoid using money in his daily life, the inscription of the motto on coins and currency forces him to violate a basic tenet of his religion and requires him to evangelize for a religious belief he expressly decries.

[11] The burdens Newdow contends are imposed by the motto rest on a single premise: the motto represents a purely religious dogma and constitutes a government endorsement of religion.[12] During oral argument, Newdow confirmed his RFRA claim is dependent on his contention that the national motto represents a religious dogma and constitutes governmental sponsorship of religion. Newdow further confirmed he does not claim his religious exercise would be burdened even if the motto were not a purely religious dogma.

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[12] For instance, the complaint makes the following allegations: "Newdow is forced to confront government-endorsed, purely religious dogma . . . ."; "Defendants have chosen to place purely ((Christian) monotheistic) religious dogma on the coins and currency . . . ."; "Defendants' use of the purely religious, (Christian) monotheistic motto has also substantially burdened Newdow's ability to meet and assemble with others for the purpose of furthering his ministry."; "[Newdow is] forced to evangelize for (Christian) Monotheism precisely as Congress and others envisioned." Newdow's opening brief in this court similarly alleges: "Defendants have essentially compelled [Newdow] to bear on his person items that make a purely religious claim . . . ."; and "Plaintiff is, in essence, forced to advocate for Monotheism, a religious belief system he expressly repudiates.").

[12] As a result, Newdow's RFRA claim is barred by *Aronow*. Although *Aronow* was an Establishment Clause challenge to the motto, and did not involve a RFRA claim, *Aronow* forecloses the central premise of Newdow's RFRA claim: the motto is a purely religious dogma and a government endorsement of religion. *Aronow* held the national motto is of a "patriotic or ceremonial character," has no "theological or ritualistic impact," and does not constitute "governmental sponsorship of a religious exercise." *Aronow*, 432 F.2d at 243-44.

VI. Conclusion

We hold Newdow lacks standing to challenge 36 U.S.C. § 302. Newdow's Establishment Clause challenge against 31 U.S.C. §§ 5112(d)(1) and 5114(b) and his RFRA claim are foreclosed by binding Ninth Circuit precedent. We dismiss Newdow's challenge to § 302 for lack of jurisdiction, and affirm the district court's order dismissing the remaining causes of action for failure to state a claim upon which relief can be granted.

AFFIRMED.

REINHARDT, Circuit Judge, concurring in the result only:

The majority opinion in *Newdow v. Rio Linda Union School District*, No. 05-17257, which has today become the law of the circuit, fails to comprehend the

constitutional principles set forth in the relevant Establishment Clause cases that the Supreme Court has decided in the years following our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). See *Rio Linda* dissent *passim* (Reinhardt, Circuit Judge). Because I am now required to follow that precedent, no matter how misguided, I am also now required to conclude that Newdow's claims in this case are foreclosed by *Aronow*, and therefore to concur in the result. I do not express any view as to what result I might have reached in the absence of the numerous errors of constitutional law that the majority made in *Rio Linda*, and the erroneous result it reached.

Appendix B

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 21B--RELIGIOUS FREEDOM RESTORATION

Short Title

This Act [enacting this chapter and amending section 1988 of this title and section 504 of Title 5, Government Organization and Employees] may be cited as the "Religious Freedom Restoration Act of 1993".

Sec. 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Sec. 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Sec. 2000bb-2. Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

Sec. 2000bb-3. Applicability

(a) In general
This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction
Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected
Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

Sec. 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Appendix C

Court of Appeals' Order Denying Appellant's Petition for Panel Rehearing and the Suggestion for Rehearing En Banc
(DktEntry: 115)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-16344

D.C. No. CV-05-12339-FCD

FILED OCT 08 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL A. NEWDOW,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; et al..,

Defendants - Appellees,

PACIFIC JUSTICE INSTITUTE,

Defendant - Intervenor - Appellee.

ORDER

Before: D.W. NELSON, REINHARDT, and BEA,
Circuit Judges.

Judge Bea has voted to deny the petition for panel rehearing and the suggestion for rehearing en banc, and Judge D. Nelson has so recommended. Judge Reinhardt has voted to grant the petition for panel rehearing and the suggestion for rehearing en banc.

The suggestion for rehearing en banc has been circulated to the full court, and a majority of the active judges did not vote to rehear the case en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and suggestion for rehearing en banc are denied.

Appendix D

District Court's Dismissal Order
(Document 52)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV. S-05-2339 FCD PAN

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER,
Plaintiff,

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,
Defendants.
_____/

This matter is before the court on defendants' motions to dismiss.[1] Plaintiff, the Rev. Dr. Michael A. Newdow, opposes the motions. For the reasons set forth below,[2] defendants' motions to dismiss are GRANTED.

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[1] Federal government defendants and defendant Pacific Justice Institute ("PJI") filed separate motions to dismiss.

[2] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. See E.D. Cal. L.R. 78-230(h).

BACKGROUND

On November 18, 2005, plaintiff filed a complaint in this court, seeking declaratory and injunctive relief regarding the use of the phrase "In God We Trust" as the national motto and its inscription on United States coins and currency. (Compl., filed Nov. 18, 2005). The complaint names as defendants the Congress of the United States of America, Peter Lefevre as Law Revision Counsel, the United States of America, John William Snow as Secretary of the Treasury, Henrietta Holsman Fore as Director of the United States Mint, and Thomas A. Ferguson as Director of the Bureau of Engraving and Printing. (1st Am. Compl. ("FAC"), filed May 10, 2006, ¶¶ 8-13). On January 29, 2005, the court granted Pacific Justice Institute's ("PJI") motion to intervene as a defendant in the action. In this litigation, plaintiff seeks to scrub out the reference to "God" in the motto of the nation.

Plaintiff Michael A. Newdow "is an ordained minister and the founder of the Atheistic church, the First Amendmist Church of True Science ("FACTS")." (*Id.* ¶ 7). Plaintiff "is an Atheist whose religious beliefs are specifically and explicitly based on the idea that there is no god." (*Id.* ¶ 157). His church, FACTS, "holds as a fundamental truth that there is no god or supernatural being." (*Id.* ¶ 161). Plaintiff alleges that "he finds it deeply offensive to have his government and its agents advocating for a religious view he specifically decries." (*Id.* ¶ 157). In particular, plaintiff takes issue with the legislation

set forth in 36 U.S.C. § 302,[3] which provides that "In God We Trust" is the national motto, and in 31 U.S.C. §§ 5112 and 5114,[4] which provide that United States coins and currency shall have the inscription "In God We Trust." (*Id.* ¶¶ 177, 179). Plaintiff asserts that, as a result, defendants have violated his rights under the Establishment Clause, the Free Exercise Clause, the Religious Freedom Restoration Act ("RFRA"), the Equal Protection Clause, and the Free Speech Clause.[5] Defendants move to dismiss plaintiff's claims on the grounds of (1) lack of standing; (2) immunity; and (3) failure to state a claim upon which relief can be granted.

STANDARD

A complaint will not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his [or her] claim that would entitle him [or her] to relief." Yamaguchi v. Dep't of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997)(quoting Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545 (9th

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[3] This legislation was enacted in 1956, and is referred to by plaintiff as the "Act of 1956." (FAC ¶ 138).

[4] This legislation was enacted in 1955 and is referred to by plaintiff as the "Act of 1955." (FAC ¶ 115).

[5] In his opposition, plaintiff does not address defendants' motions to dismiss his claims under the Equal Protection Clause and the Free Speech Clause or the arguments in support thereof. The court interprets plaintiff's silence as a non-opposition to defendants' motions on these claims. Therefore, defendants' motions to dismiss plaintiff's Equal Protection and Free Speech claims are GRANTED.

Cir. 1996)). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

Given that the complaint is construed favorably to the pleader, the court may not dismiss the complaint for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45 (1957); NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

Nevertheless, it is inappropriate to assume that plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

ANALYSIS

I. Standing

The issue of standing is a threshold determination of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975); Steel Co. v. Citizens For A Better Env't, 523 U.S. 83 (1998). "The judicial power of the United States defined by Art[icle] III is not an unconditioned authority to determine the constitutionality of

legislative or executive acts." Valley Forge Christian Coll. v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). Rather, Article III limits "the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" Id. at 472 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)); Steele, 523 U.S. at 102. "Those who do not possess Article III standing may not litigate as suitors in the Courts of the United States." Id. at 476.

The Supreme Court has set forth that "[t]he 'irreducible constitutional minimum of standing' contains three requirements." Steele, 523 U.S. at 102-03 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). First, plaintiff must allege an "injury in fact – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural, or hypothetical." Id. at 103 (internal quotations and citations omitted). "[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." FEC v. Akins, 524 U.S. 11, 23 (1998). However, it is possible for a plaintiff to allege an injury that, although shared by many, is particularized and concrete. Id. at 24. Second, plaintiff must allege causation – "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." Steele, 523 U.S. at 103. (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). The injury must not be the result of some third party not before the court. Lujan, 504 U.S. at

560 (citing Simon, 426 U.S. at 41-42). Third, the injury must be redressable – there must be "a likelihood that the requested relief will redress the alleged injury. Steele, 523 U.S. at 103 (citing Simon, 426 U.S. at 45-46). Defendants argue that plaintiff fails each of these three standing requirements.

Plaintiff alleges a multitude of injuries caused by his Encounters with the national motto. He asserts that, as an Atheist, he is a member of a "small minority" (according to plaintiff, 5% of all Americans). (FAC, App. K, at 5). Plaintiff argues that, as a member of such a minority, he is affected by the national motto in a different and more particularized manner than the majority. Generally, he contends that he is deeply offended "to have his government and its agents advocating for a religious view" and that he suffers injury "when his government and its agents . . . engage in such advocacy." (FAC ¶¶ 157-58).

Specifically, plaintiff asserts that he has been personally injured by the national motto and its inscription on coins and currency because: (1) the national motto degrades him and other Atheists from the "equal rank" of citizens and turns Atheists into "political outsiders" (FAC ¶ 178); (2) he was recently denied a job because of the mis-perception of his activism and because of the government's endorsement that "belief in God is 'good' and disbelief in God is 'bad'" – a notion reinforced by the national motto (Id. ¶¶ 188, 190); (3) he has given up hope of attaining elective office because of the anti-Atheistic bias that the government has perpetuated by the national motto (Id. ¶ 214); (4) he is repeatedly forced to confront a "religious belief" (the national motto)

which he finds offensive both when he inspects coins during his normal purchasing activities and when he inspects his coin collection[6] (Id. ¶¶ 223-24); (5) he has been and is forced to "proselytize" and "evangelize" on behalf of monotheism when he spends coins and currency (Id. ¶¶ 230, 261- 62); (6) he was and is not able to raise funds for his ministry because of the offensive religious dogma on "the nation's monetary instruments" (Id. ¶¶ 240-41); (7) religious garb worn during FACTS church services and "FACTS libation – known as 'The Freethink Drink'" – cannot be purchased at times because of the offensive "religious dogma" on coins and currency (Id. ¶ 247-48); and (8) FACTS-related "research trips" have been cancelled due to the need to use United States currency to pay for such trips (Id. ¶¶ 252-54, 257).

Plaintiff alleges that all of the above described injuries were caused by the government defendants named in this action. The court finds that this is not the case. Some of the injuries alleged by plaintiff are not fairly traceable to defendants, but rather to third parties not before this court. For example, plaintiff alleges that he was denied employment because of misperceptions of his Atheistic activism and because of the governmental endorsement, reinforced by the national motto, that "belief in God is 'good' and disbelief in God is 'bad.'"[7] In other words, plaintiff

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[6] The court finds it ironic that plaintiff collects and inspects that which he finds so offensive.

[7] Plaintiff's allegations involving the refusal to be hired, the relinquishment of plaintiff's aspirations to hold elected office, derogatory remarks based upon plaintiff's Atheism, and a social environment where prejudice is perpetuated against Atheists share the same causation deficiencies.

argues that the national motto reinforces social bias against Atheism, which in turn, creates antagonism against his perceived activism. According to plaintiff, this antagonism caused a potential employer not to hire him as a result of his activism. The causal link between the national motto and plaintiff's alleged loss of employment opportunity appears to be the result of a personal fixation derived from plaintiff's ardent beliefs, but hardly meets the requirements of Article III standing. See Simon, 426 U.S. at 41-43 (holding that causation requirement was not met where plaintiffs asserted that the challenged federal regulations "encouraged" the actions of private entities that resulted in the injury complained of).

To the extent that plaintiff's injuries are traceable to defendants, such alleged injuries seem to stem from the perceived rank offensiveness of the national motto, itself. For example, plaintiff asserts that because of the offensive nature of the motto, he is unable to, inter alia, raise funds for his ministry, buy "libations" and "religious garb," and take "research trips."

Generally, a plaintiff does not sufficiently allege injury-in-fact for the purposes of Article III standing where the only harm is psychological injury "produced by observation of conduct with which one disagrees." See Valley Forge, 454 U.S. at 485. In

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Additionally, plaintiff has attached considerable documentation to his complaint, and, in his opposition, engages in extensive discussion of personal experiences and encounters to demonstrate that American culture and the national motto are often identified with belief in Christianity or monotheism. However, this documentation and discussion is wholly irrelevant to the claims against *these defendants* because plaintiff does not allege the requisite causal connection.

Valley Forge, plaintiffs brought suit based upon the conveyance of government land in Pennsylvania to a non-profit educational institution operating under the supervision of a religious order. Valley Forge, 454 U.S. at 468. Plaintiffs, who resided in Maryland and Virginia and had their organizational headquarters in Washington, D.C., learned about the transfer through a news release. Id. at 486-87. The Supreme Court held that the injuries alleged amounted to generalized grievances about the conduct of government, which do not satisfy the requirements of Article III.

However, federal courts addressing allegations of Establishment Clause violations after Valley Forge have recognized that the concept of injury in these types of cases is particularly elusive because the Establishment Clause plaintiff is not likely to suffer physical injury or pecuniary loss. See Surhe v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997); Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 682 (6th Cir. 1994); Saladin v. City of Milledgeville, 812 F.2d 687, 691 (11th Cir. 1987); Newdow v. Bush, 355 F. Supp. 2d 265, 277-78 (D.D.C. 2005). Therefore, various Circuits have found sufficient injury-in-fact based upon the observation of offensive religious materials where plaintiffs have alleged a "personal connection" with the challenged conduct. See Newdow, 355 F. Supp. 2d at 278 (citing Suhre, 131 F.3d at 1087 (county resident had standing to challenge Ten Commandment display in county courthouse); Washegesic, 33 F.3d at 681-83 (former student had standing to challenge religious portrait displayed at public school); Saladin, 812 F.2d at 692-93 (residents in and around city had standing

to challenge religious symbols on city seal)). Such cases distinguish the Supreme Court's rejection of plaintiffs' psychological injuries in Valley Forge on the basis of the proximity of the plaintiffs to the conduct they challenged, examining circumstances such as the frequent contact between the plaintiff and the offensive conduct or display. Newdow, 355 F. Supp. 2d at 278 n.11 (citing, Suhre, 131 F.3d at 1090).

In this case, plaintiff has alleged that he is deeply offended by the national motto, "In God We Trust," and the inscription of that motto on national coinage and currency. Because of the ubiquity of coins and currency in everyday life, plaintiff is necessarily and continuously confronted with the alleged endorsement of religion by the federal government. Further, plaintiff alleges that, as a member of a small minority of Americans, he is particularly affected by the use of "In God We Trust" as the national motto inscribed on coins and currency. Therefore, to the extent that plaintiff's injuries are purely psychological in nature, such confrontation with the national motto on coins and currency demonstrates a personal connection sufficient to establish Article III standing.

Finally, plaintiff alleges that his injuries are redressable by the court. Plaintiff seeks both declaratory and injunctive relief. As to declaratory relief, plaintiff requests the court to declare (1) that Congress violated the Establishment Clause and the Free Exercise Clause in passing the Acts of 1955 and

1956;[8] (2) that the inscription "In God We Trust" on coins and currency violates the Establishment Clause, the Free Exercise Clause, and RFRA; and (3) that the national motto violates the Establishment Clause, the Free Exercise Clause, and RFRA. Defendants argue that the relief requested by plaintiff would not meaningfully redress plaintiff's alleged injuries. In their opposition, defendants address only plaintiff's requests for injunctive relief, not his requests for declaratory relief.

The Supreme Court instructs that declaratory relief can usually provide a preferable alternative remedy to injunctive relief in cases such as this. Wooley v. Maynard, 430 U.S. 705, 711 (1977). "[A] district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." Id. (internal quotations omitted). A judicial declaration that the national motto is unconstitutional because it violates the First Amendment would redress plaintiff's claimed injury that the national motto offends him as an Atheist. As such, and for the reasons set forth below, the court does not reach the issues of whether the injunctive relief requested by plaintiff could be ordered by this court or whether such injunctive relief would adequately redress his injuries.

Because plaintiff has alleged injury-in-fact, causation, and redressability, plaintiff has

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[8] The court addresses the jurisdictional problems with plaintiff's claims against the Legislative Branch defendants, *infra*, in Section II.

sufficiently alleged standing in the current litigation.[9]

II. Immunity

Defendants argue that the Legislative Branch defendants, namely Congress and the Law Revision Counsel, must be dismissed because these defendants are entitled to immunity. The Speech and Debate Clause of Article I of the Constitution provides that "[t]he Senators and Representatives ... shall not be questioned in any other Place" for "any Speech or Debate in either House." U.S. Const. Art. I, § 6, cl. 1. The Supreme Court has interpreted the scope of the Speech and Debate Clause broadly to effectuate its purpose of protecting "the integrity of the legislative process by insuring the independence of individual legislators." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975). In Eastland, the Court held that in determining whether the acts of members of Congress are protected by immunity, the court looks solely to whether or not the conduct falls within the "sphere of legitimate legislative activity." Id. If the conduct falls within this sphere, Congress is absolutely immune from being "questioned in any other Place." Id. Further, the Clause applies equally to officers and other employees of the Congress when they are engaged in legislative activity. See, e.g., id., Gravel v. United States, 408 U.S. 606, 618 (1972).

In determining whether conduct falls within the "sphere of legitimate legislative activity," the

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[9] Plaintiff also alleges that he has taxpayer standing. Because the court has determined that plaintiff has sufficiently alleged citizen standing, the court does not reach this issue.

court "must determine whether the activities are 'an integral part of the deliberative and communicative processes by which Members participate in ... proceedings with respect to the consideration and passage ... of proposed legislation.'" Eastland, 421 U.S. at 504 (quoting Gravel, 408 U.S. at 625). In this case, plaintiff brings suit against Congress for the adoption of legislation that he alleges violates the Constitution and federal statutes. Plaintiff also brings suit against the Law Revision Counsel for preparing and publishing the United States Code which includes such legislation.

Plaintiff argues that defendants are not immune from plaintiff's claims because "performing a clearly unconstitutional act cannot, in any way, be considered part of the legislative process." (Opp'n at 42). This argument runs counter to the Supreme Court's broad interpretation of Congress' immunity under the Clause. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." Eastland, 421 U.S. at 508-09; see also Newdow v. U.S. Congress, 328 F.3d 466, 484 (9th Cir. 2003), rev'd on other grounds sub nom., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

The enactment of legislation and its subsequent publication is squarely within the sphere of legitimate legislative activity because plaintiff seeks to sue Congress for enacting laws and Law Revisions Counsel for accurately publishing those laws. Therefore, the Legislative Branch defendants are entitled to Speech and Debate Clause immunity

and accordingly, plaintiff's claims against these defendants are DISMISSED.[10]

III. Establishment Clause

Plaintiff claims that the national motto violates the Establishment Clause of the First Amendment. The Ninth Circuit explicitly addressed this issue in Aronow v. United States, 432 F.2d 242 (9th Cir. 1970). In Aronow, the court held that

> [i]t is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

Id. at 243. The court could not easily discern "any religious significance attendant the payment of a bill with coin or currency on which has been imprinted 'In God We Trust' or the study of a government publication or document bearing that slogan."[11] Id. The Ninth Circuit further explained that "the motto has no theological or ritualistic impact," but rather, as stated by Congress, "has 'spiritual and psychological value' and 'inspirational quality.'" Id. at 243-44. Therefore, the Ninth Circuit held that the

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[10] Because the Legislative Branch defendants are dismissed based upon Speech and Debate Clause immunity, the court need not reach the issue of sovereign immunity.

[11] Further, the court noted that "such secular uses of the motto was viewed as sacrilegious and irreverent by President Theodore Roosevelt." Id.

national motto "In God We Trust" and its printing on coins and currency does not violate the Establishment Clause. Id. at 242-44.

Plaintiff concedes that the Ninth Circuit's decision in Aronow is directly on point and is binding precedent on this court. However, plaintiff contends that Aronow is "wrongly decided." "Wrongly decided" or not, this court must and does, here, follow Ninth Circuit precedent. See United States v. Johnson, 256 F.3d 895, 916 (9th Cir. 2001) (holding that where "a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling . . . can only be overturned by an en banc court or by the Supreme Court"). Therefore, defendants' motions to dismiss plaintiff's Establishment Clause claim are GRANTED.

IV. Free Exercise Clause and Religious Freedom Restoration Act

Plaintiff also asserts that the national motto and its printing on coins and currency violates his rights under the Free Exercise Clause of the First Amendment and under the Religious Freedom Restoration Act ("RFRA"). Plaintiff alleges that the inscription of the words "In God We Trust" on money repeatedly forces him to confront a religious belief he finds offensive and which substantially burdens his right to exercise his Atheistic beliefs. (FAC ¶ 223). Plaintiff also asserts that he is effectively compelled to carry "religious dogma" on his person and to proselytize on behalf of the purely religious claim, "In God We Trust," when exchanging currency for goods. (Id. ¶¶ 230-31). As a result, plaintiff asserts, *inter*

alia, that he cannot raise money in his church meetings and at times, cannot purchase religious garb, nor "formulate" "the FACTS libations . . . in its recommended manner." (Id. ¶¶ 239, 241, 247-48).

Essentially, plaintiff claims that the alleged governmental endorsement of monotheism on coins and currency burdens his right to exercise his Atheistic beliefs. Government attempts to disfavor a religion are generally analyzed under the Free Exercise Clause, while allegations of governmental efforts to benefit religion are generally addressed under the Establishment Clause. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1190 (9th Cir. 2006); Church of Lukumi Babalu Aye, Inc. v. City of Hialeh, 508 U.S. 520, 531 (1993). Here, the gravamen of plaintiff's alleged injuries stem from the government's "endorsement" of monotheism, not the government's "disfavor" of Atheism. Therefore, plaintiff's Free Exercise and RFRA claims appear to simply restate his Establishment Clause claim in an effort to elude Ninth Circuit binding precedent. However, in the interest of completeness, the court briefly addresses plaintiff's claims that the national motto "substantially burdens" the exercise of his religion.

As stated above, the Ninth Circuit in Aronow held that the national motto is excluded from First Amendment significance because the motto "has no theological or ritualistic impact" and is of a purely secular, "patriotic," and "ceremonial character." 432 F.2d at 243-44. The court also stated that the purpose of the national motto is not to use the State's coercive power to aid religion, "either in Congressional intent or practical impact on society."

Id. at 244 (citing McGowan v. Maryland, 366 U.S. 420 (1961)). Therefore, despite plaintiff's strenuous protestations of errancy, Ninth Circuit authority has found the national motto "In God We Trust" to be secular in nature and use. Id.

> The law is clear [] that governmental programs that "may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not infringe on free exercise rights protected by the First Amendment (and therefore RFRA).

Newdow v. Bush, 355 F. Supp. 2d at 290 (quoting Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 450-51 (1988)). In light of Aronow, plaintiff's use of currency does not, as a matter of law, demonstrate government coercion to proselytize or evangelize on behalf of monotheism.

Undaunted by Circuit authority, plaintiff argues that the Supreme Court's decision in Wooley v. Maynard supports his Free Exercise claim. 430 U.S. 705 (1977). In Wooley, the Court held that the State of New Hampshire could not require citizens to display the state motto, "Live Free or Die," upon their vehicle license plates. 430 U.S. at 717. The Court specifically acknowledged that the New Hampshire law required individuals "to participate in the dissemination of an ideological message by displaying it on [] private property in a manner and for the express purpose that it may be observed and read by the public." Id. at 713. Because the First

Amendment protects the right of individuals to hold a viewpoint different from the majority and to refuse to foster an idea they find objectionable, the plaintiffs in Wooley were protected by the First Amendment. Id. at 715.

However, the Supreme Court made clear in Wooley that it did not intend that this analysis be read as sanctioning the obliteration of the national motto from United States coins and currency. Id. at 717 n.15. While the Court recognized that this issue was not before it, it distinguished its analysis of New Hampshire's requirement of placing the state motto on license plates from the placement of the national motto on currency.

> C]urrency which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Id.

Plaintiff's Free Exercise and RFRA claims arise from his assertion that the motto is blatantly religious. Because the national motto has been held to be secular in nature, there is no proper allegation that the government compelled plaintiff to affirm a repugnant belief in monotheism.[12] See Sherbert v.

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[12] Further, as the Supreme Court noted in Wooley, individuals are not personally associated with the currency they spend as they are with their automobiles. See id.

Verner, 374 U.S. 398, 402 (1963). Plaintiff has not sufficiently alleged that the government "penalized or discriminated" against him because of his religious views or that it "conditioned the availability of benefits upon [his] willingness to violate a cardinal principle of his religious faith." See Harper, 445 F.3d at 1188 (quoting Sherbert, 374 U.S. at 402, 406). Nor has plaintiff sufficiently alleged that the government lent "its power to one or the other side in controversies over religious authority or dogma, or punish[ed] the expression of religious doctrines it believes to be false." Id. (quoting Employment Div. Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990)). As such, plaintiff has not set forth a claim that the government's conduct in the continuing use of "In God We Trust" as the national motto and its inscription on coins and currency constitutes a substantial burden on the exercise of his religious beliefs. Accordingly, defendants' motions to dismiss plaintiff's Free Exercise and RFRA claims are GRANTED.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss are GRANTED.

IT IS SO ORDERED.

DATED: June 12, 2006.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, JR.
United States District Judge

Appendix E

Aronow District Court's Order
Filed September 30, 1968

JAMES P. WELSH, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 49992

STEFON RAY ARONOW, Plaintiff,	) ORDER DENYING) TEMPORARY) RESTRAINING ORDER,
v.	) PRELIMINARY) INJUNCTION, AND) MOTION FOR THREE-
UNITED STATES, et al., Defendants.	) JUDGE DISTRICT) COURT AND) DISMISSING ACTION

Plaintiff has brought this action apparently seeking injunctive relief against the use of the phrase "In God We Trust" as a national motto and to prohibit the use of said phrase on the currency and other document of the United States. Plaintiff also has moved to convene a three-judge district court;

The Court heard plaintiff concerning his application for interim injunctive relief and considered all documents on file and made the following determinations:

1. The issuance of any temporary restraint or preliminary injunction of the nature prayed for in the complaint would cause severe harm to the defendants and the United States, whereas the denial of such relief would not cause the plaintiff irreparable injury;

2. The complaint fails to state a claim upon which relief can be granted;

3. The complaint is unintelligible;

4. The complaint fails to state any valid basis for this Court to exercise jurisdiction and in fact the Court lacks subject matter jurisdiction;

5. The complaint fails to demonstrate that plaintiff has any standing to maintain this action;

6. The complaint fails to state any claim which would necessitate the convening of a three-judge district court and the Court finds that no substantial constitutional question concerning any federal statute has been presented;

7. The complaint fails to state any claim upon which relief can be granted under the "establishment clause" of the First Amendment.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to convene a three-judge district court and his application for temporary restraining order and preliminary injunction be and hereby are denied;

IT IS FURTHER ORDERED that the complaint and action be and hereby are dismissed in their entirety.

Dated: Sept. 30, 1968

Lloyd H. Burke
United States District Court

Appendix F

Aronow Court of Appeals Opinion
Filed October 6, 1970

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEFAN RAY ARONOW,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, Et al.,
Defendants-Appellees,

No. 23,444

[October 6, 1970]

On Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and CARTER, Circuit Judges,
and THOMPSON,* District Judge.

THOMPSON, District Judge:

This is an appeal from the orders of the District Court refusing to invoke a three-judge court and dismissing plaintiff's complaint. The complaint

* Hon. Bruce R. Thompson, United States District Judge, Reno, Nevada, sitting by designation.

challenged the use of expressions of trust in God by the United States Government on its coinage, currency, official documents and publications. Specifically, the action challenged the constitutionality as repugnant to the Establishment Clause of the First Amendment of two federal statutes:

> "At such time as new dies for the printing of currency are adopted, the dies shall bear, at such place or places thereon as the Secretary of the Treasury may determine to be appropriate, the inscription 'In God we Trust,' and thereafter this inscription shall appear on all United States currency and coins." 31 U.S.C. § 324a.
>
> "The national motto of the United States is declared to be 'In God we trust.' 36 U.S.C. § 186.

The District Court ruled that plaintiff, as a taxpayer and citizen, lacked standing to challenge the validity of the statutes and that the merits of the claim of unconstitutionality were insubstantial. Inasmuch as we agree on the insignificance of the charge of unconstitutionality, we do not reach the question of standing.

A three-judge court need not be convened under 28 U.S.C. § 2282 unless there are substantial grounds for attacking the constitutionality of the Congressional enactment in question. *Ex Parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933); *Bailey v. Patterson*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962).

It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

In *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), the Supreme Court held that the Regents' Prayer prescribed by state statute as part of the daily ceremony for opening school was definitely a religious activity falling under the prohibition of the First Amendment. Yet, in alluding to the distinction between this and purely patriotic or ceremonial expressions, the High Court said:

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

It is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted "In God We Trust" or

the study of a government publication or document bearing that slogan. In fact, such secular uses of the motto was viewed as sacrilegious and irreverent by President Theodore Roosevelt. Yet, Congress has directed such uses.[1] While "ceremonial" and "patriotic" may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact.[2] As stated by the Congressional report, it has "spiritual and psychological value" and "inspirational quality."[3]

Not only does *Engel v. Vitale*, *supra*, direct the result here, but *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), buttresses the position. There the Maryland Sunday laws were held

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[1]Church and State in the United States, Stokes & Pfeffer, p. 569.

[2]"Separation purists like Jefferson might have theoretic objections to these, but even he recognized that as a practical matter such ceremonial verbalizations could frequently not be avoided; both his Declaration of Independence and his Virginia Religious Freedom statute invoked God. The problems raised by such references are not intrinsic but extrinsic; that is, of themselves they are of no practical significance, but their importance lies in their facile and frequent use to justify practices that raise substantial and practical church-state problems." Church State and Freedom, Pfeffer, p. 238.

[3]"Currency has been issued by the United States Government since 1861. Thus, for almost a century, there has been no inscription on our currency reflecting the spiritual basis of our way of life." Senate Report No. 637, 1955 Cong. & Admin. News, 2417.

"It will be of great spiritual and psychological value to our country to have a clearly designated national **motto** of inspirational quality in plain, popularly accepted English." House Report No. 1959, 1956 Cong. & Admin. News, p. 3720.

not violative of the Establishment Clause, and the majority opinion concluded: "We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose – evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect – is to use the State's coercive power to aid religion." As we have seen, the national motto has no such purpose, either in Congressional intent or practical impact on society. And earlier this year, in *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), the High Court, holding tax exemption of religious organizations constitutional reiterated the *McGowan* philosophy, at pp. 669-670:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> "*Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or*

have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." (Emphasis added.)

Accordingly, the judgment of the District Court is affirmed.